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# In The Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

STATE OF GEORGIA, ET AL.

TONY GOODMAN,

*Petitioner,*

v.

STATE OF GEORGIA, ET AL.

**On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, validly abrogates states' Eleventh Amendment immunity as applied to suits by state prison inmates regarding conditions of confinement.

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## STATEMENT OF THE CASE

Petitioner Goodman, a disabled convicted felon currently serving a sentence for aggravated assault, possession of a firearm by a convicted felon and possession of a controlled substance with intent to distribute, filed the present action on January 6, 1999, seeking damages and injunctive relief for alleged violations of the United States Constitution and the Americans With Disabilities Act, 42 U.S.C. §12101 et seq. (ADA), in the District Court for the Southern District of Georgia. Mr. Goodman filed this suit and a number of emergency motions pro se and appealed the District Court's ruling to the Eleventh Circuit. Counsel was appointed for the first time by the appellate court.[1]

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[1] Plaintiff has filed at least 60 pro se federal actions since his original incarceration in 1991, including the following: *Goodman v. Murray*, Case #5:1992CV00082 (M.D. Ga., filed 1992); *Goodman v. Scroggy*, Case 1:1992CV00122 (S.D. Ga., 1992); *Goodman v. Scroggy*, 1:1992CV00149 (S.D. Ga. 1992); *Goodman v. Bridges*, 1:1993CV00017 (S.D. Ga., 1993); *Goodman v. Garner*, 6:1997MC00046 (S.D. Ga., 1997); *Goodman v. State of Ga.*, 6:1997CV00065 (S.D. Ga., 1997); *Goodman v. Garner*, 6:1997CV00107 (S.D. Ga., 1997); *Goodman v. King*, 2:1998MC00032 (S.D. Ga. 1998); *Goodman v. Lewis*, 2:1998MC00050 (S.D. Ga. 1998); *Goodman v. Mailloux*, 6:1998MC00065 (S.D. Ga. 1998); *Goodman v. King*, 6:1998CV00118 (S.D. Ga. 1998); *Goodman v. Bradford*, 6:1998CV00137 (S.D. Ga. 1998); *Goodman v. Lewis*, 6:1998CV00153 (S.D. Ga. 1998); *Goodman v. Ray*, 6:1999MC00001 (S.D. Ga. 1999); *Goodman v. State of Ga.*, 6:1999CV00021 (S.D. Ga. 1999); *Goodman v. Wood*, 2:1999CV00165 (N.D. Ga. 1999); *Goodman v. Morgan*, 2:1999CV00208 (N.D. Ga. 1999); *Goodman v. Wetherington*, 5:1999CV00443 (M.D. Ga. 1999); *Goodman v. Lewis*, 7:2001CV00023 (M.D. Ga. 2001); *Goodman v. Lewis*, 7:2001CV00044 (M.D. Ga. 2001); *Goodman v. Lewis*, 7:2001CV00081 (M.D. Ga. 2001); *Goodman v. Kemp*, 1:1987CV01195 (N.D. Ga. 1987); *Goodman v. Riggins*, 3:1991CV0004 (N.D. Ga. 1991); *Goodman v. Riggins*, 3:1991CV00097 (N.D. Ga. 1991); *Goodman v. Cantrell*, 3:1991CV00116 (N.D. Ga. 1991); *Goodman v. Brinson*, 4:1991CV00247 (N.D. Ga. 1991); *Goodman v. Cantrell*, 3:1991CV01117 (N.D. Ga. 1991); *Goodman v. Brinson*, 1: 1991CV02302

(Continued on following page)

In the present case, Goodman's complaint, which the appeals court said "was less than a model of clarity," (Petitioners' Appendix A, p. 16a), alleged the section of Georgia State Prison where he resided in 1998 "lacks facilities for the disabled 'for hygiene, drinking, and performing bodily excretion functions.'" Petitioners' Appendix A, p. 4a. He also, as the Court points out, alleges he has suffered "long periods of deprivation of basic amenities," such as, "showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care,

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(N.D. Ga. 1991); *Goodman v. Brinson*, 4:1992CV00044 (N.D. Ga. 1992); *Goodman v. Brinson*, 4:1992CV00048 (N.D. Ga. 1992); *Goodman v. Brinson*, 4:1992CV00049 (N.D. Ga. 1992); *Goodman v. Brinson*, 1:1992CV00083 (N.D. Ga. 1992); *Goodman v. Scroggy*, 3:1993CV00026 (N.D. Ga. 1993); *Goodman v. Ga. Board of Pardons and Paroles*, 1:1993CV00810 (N.D. Ga. 1993); *Goodman v. Hipkens*, 1:1993CV02249 (N.D. Ga. 1993); *Goodman v. Proctor*, 3:1995CV00120 (N.D. Ga. 1995); *Goodman v. Johnson*, 1:1995CV03083 (N.D. Ga. 1995); *Goodman v. Beddingfield*, 1:1996CV00088 (N.D. Ga. 1996); *Goodman v. Moore*, 2:1998MC00044 (S.D. Ga. 1998); *Goodman v. Brodford*, 6:1998CV00192 (S.D. Ga. 1998); *Goodman v. Brodford*, 6:1998CV00197 (S.D. Ga. 1998); *Goodman v. Ga. Board of Pardons and Paroles*, 1:1998CV02042 (N.D. Ga. 1998); *Goodman v. Hammonds*, 1:1998CV02528 (N.D. Ga. 1998); *Goodman v. Judge Moore*, 2:1999CV0004 (S.D. Ga. 1999); and *Goodman v. Lewis*, 3:2001CV00077 (N.D. Ga. 2001); *Goodman v. Howerton*, 5:2003CV00028 (S.D. Ga., 2003); *Goodman v. Ferrell*, 5:2003CV00039 (S.D. Ga. 2003); *Goodman v. Smith*, 6:2003CV00158; *Goodman v. Georgia Correctional*, 1:2002CV00172 (S.D. Ga. 2002); *Goodman v. Howerton*, 1:2003CV00973 (N.D. Ga. 2003); *Goodman v. Smith*, 1:2004CV02705 (N.D. Ga. 2004); *Goodman v. Huntfree*, 1:2003CV03551 (N.D. Ga. 2003); *Goodman v. Donald*, 6:2004CV00127 (S.D. Ga. 2004); *Goodman v. Smith*, 6:2004CV00139 (S.D. Ga. 2004); and *Goodman v. Ga. Board of Pardons and Paroles*, 1:2004CV01221 (N.D. Ga. 2004). Defendants further note that this Plaintiff has had at least five appeals before the Eleventh Circuit dismissed for frivolity: *Goodman v. King*, Case #99-8031-B (11th Cir. 1999); *Goodman v. Judges Moore and Graham*, #99-10407-B (11th Cir. 2000); *Goodman v. Brodford*, #99-10310-B (11th Cir. 2000); *Goodman v. State of Ga.*, #98-8380-A (11th Cir. 1999); and *Goodman v. Garner*, #98-9245 (11th Cir. 1999).

laundry service, cleaning service, and phone service." *Id*, at 5a. He also said he was forced to sit, immobilized, in his cell for long periods of time because the cell was too small, and that he had to sit in his own waste because he could not transfer from his wheelchair to the cell toilet.[2] The magistrate recommended dismissal of Mr. Goodman's 42 U.S.C. §1983 constitutional claims because they were overly vague and insufficient under Rule 8. Initially, the entire ADA claim was allowed to proceed, but the magistrate recommended summary judgment on the ADA claim based on this Court's decision in *Board of Trustees of the University of Alabama, et al. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001) as to Plaintiff's claim for monetary damages. As to his claim for injunctive relief, the magistrate recommended dismissal due to mootness because Goodman had been moved to another prison. The District Court followed the recommendations.

Goodman appealed, and the Eleventh Circuit ruled the district court erred in dismissing some of Goodman's §1983 claims for monetary damages. *Id.* p. 14a. Specifically, the Eleventh Circuit vacated the dismissal of Goodman's §1983 claims for damages where he alleged Eighth Amendment violations by prison officials who Goodman accused of leaving him immobile in his cell for prolonged periods, forcing him to sit in his own waste, and knowingly denying him access to medical treatment and prison programs and activities. The Court also said he was

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[2] While the Eleventh Circuit could not weigh Goodman's factual allegations that he lacks the ability to transfer from his wheelchair to his toilet, in the criminal case for which he is now in prison Mr. Goodman shot at his girlfriend and then removed himself from the wheelchair and beat her. *Goodman v. State*, 237 Ga. App. 795 (516 S.E.2d 824) (1999).

entitled to be heard on his claim for injunctive relief under the ADA. *Id.* at 22a.

As to Goodman's ADA claim for monetary relief, the Court affirmed the magistrate judge's grant of summary judgment in one sentence: "We first affirm the magistrate judge's grant of summary judgment to all the defendants on Goodman's ADA claims for monetary damages as barred by the Eleventh Amendment. *Miller v. King*, [cit.]." Nothing is said of the claim after that point. Certiorari has not been sought on any other issue.[3]

## SUMMARY OF THE ARGUMENT

Petitioner Goodman says "[t]his case concerns a matter of longstanding disagreement in the lower courts." Brief of Petitioner Goodman, p. 6. Respondents disagree and point out that the conflict in issue in this case can hardly be described as "longstanding." Instead, the disagreement in the lower courts at issue here is between the

[3] Petitioner United States alludes to the fact that Goodman's complaint includes claims under Constitutional amendments other than the Eighth – including the First, Fifth and Sixth Amendments. While it is true that Goodman invoked those amendments, his claim of injury related to having to sit in his own waste for prolonged periods, having to live in a cell where he could not move his wheelchair, and being denied access to prison programs. He does not sufficiently allege injury to his right to access the courts. For example, he did not show he was unable to file suits or motions or was unable to access a courtroom. The Eleventh Circuit, in a footnote, specifically upheld the District Court's dismissal of Goodman's racial discrimination, due process, retaliation, inadequate food preparation, and unsafe conditions for not having fire drills "without further discussion." Petitioners' Appendix A, p. 12a, fn. 7. Neither petitioner seeks certiorari for this part of the decision.

Ninth Circuit and the Third and Eleventh Circuits regarding Congress's abrogation of the States' Eleventh Amendment immunity in the Americans with Disabilities Act (ADA) under §5 of the Fourteenth Amendment as applied to state prisoners' prison condition claims in the wake of this Court's decision less than a year ago in *Tennessee v. Lane*, 124 S.Ct. 1978 (2004). The Circuits' disagreement on this issue can be measured in months, if not weeks, and is still in its infancy at this point, with other circuits yet to decide the issue.

Respondents also disagree with Petitioner Goodman's assertion that this case "presents the ideal vehicle to resolve [the] conflict in the Circuits." Brief of Petitioner Goodman, p. 7. The present case relies entirely on another decision handed down by the Eleventh Circuit, *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004) to say the Petitioner's ADA Title II claim for damages cannot go forward. *Miller*, as Petitioner United States admits, is still pending a motion for rehearing before the Eleventh Circuit.

Additionally, Respondents do not consider this case ideal to resolve the conflict since this case is an unpublished decision which contains only one sentence bearing on the issue in question. The sentence merely cites to the still-in-the-pipeline *Miller* decision, wherein the three-judge panel issued a lengthy and detailed analysis of the ADA, the Eleventh Amendment, and *Tennessee v. Lane*, *supra*, before deciding Congress did not properly abrogate the States' Eleventh Amendment immunity when it developed Title II of the ADA as applied to prison inmates' conditions of confinement.

Finally, Respondents argue against certiorari in the present case because the Eleventh Circuit properly analyzed

the ADA and this Court's precedent regarding abrogation of Eleventh Amendment immunity. The Eleventh Circuit properly followed the process used by this Court in *Lane*, and certiorari is not necessary.

For these reasons, the petitions in the present case should be denied.

## REASONS FOR NOT GRANTING THE WRITS

### I. The Conflict Between The Circuits Is Not Sufficiently Ripe, and the Petition Should Be Denied.

While there is a conflict between decisions of the Ninth Circuit and the Third and Eleventh Circuits, Respondents argue the conflict is not ripe for a writ of certiorari at the present time. Supreme Court Rule 10(a) clearly opens the door for this Court to grant certiorari where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but there is by no means a mandate. The Court does not necessarily grant certiorari in a case where a conflict exists, and it should not do so here.

"Rule 10 of the Rules of the Supreme Court 'indicate the character of reasons' that will be considered in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between two courts of appeals," wrote Justice White, dissenting to a denial of a petition for a writ of certiorari in *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990). Justice White, who wrote almost regularly in dissent to such denials, added that "[j]ust this past Monday, we granted certiorari in two cases that, absent conflict between courts of appeals, very

likely would not have been granted. [cit.] This is a weekly occurrence, but it also regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out by Rule 10."

In *Beaulieu*, this Court declined to grant certiorari where the issue was whether a district judge can rely on testimony from the trial of a defendant's co-conspirators in sentencing that defendant. The Tenth Circuit had expressly rejected a position taken by the Eleventh Circuit on the topic. Voting 8-1, this Court elected not to take up the issue, with Justice White standing alone in dissent.

In stating the possible reasons for not taking certiorari, Justice White wrote that "[i]n some of these cases it is perhaps arguable that the alleged conflict was not 'real' or 'square'. In most cases, however, it is very difficult to deny the conflict, especially where, as in this case, the court of appeals expressly differs with another court, yet certiorari is denied because the conflict is 'tolerable' or 'narrow,' or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason." *Id.*

Respondents would use the term "unripe" to describe the conflict in question in the present case. This Court set down the road map for consideration of Title II of the ADA as applied to various government-sponsored activities in *Tennessee v. Lane*, *supra*, in 2004. The various circuit courts of appeals have had less than one year as of this writing to utilize this road map on the various applications of Title II. Only the Eleventh and Third Circuits have actually analyzed the issue in the present case in any detail, in *Miller v. King, et al.*, 384 F.3d 1248 (11th Cir. 2004), and *Cochran v. Pinchak*, 401 F.3d 184 (3rd Cir. 2005). None of the circuits have

considered the issue *en banc*, although such a petition is now pending before the Eleventh Circuit in *Miller*. The Ninth Circuit had the opportunity to enter into the same type of post-*Lane* detailed analysis, but passed on it in *Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791 (9th Cir. 2004) (cert. pending) ("*Our precedent* clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II. . . . "[emphasis added]). No other circuits have had the chance to address the issue in the post-*Lane* age. The issue has not fully ripened, and the Court would be justified in deciding to prefer to await further litigation which may produce a consensus or at least a satisfactory majority view on the application of Title II of the ADA to lawsuits by incarcerated convicts regarding the conditions of their confinement.

## II. Contrary To The Arguments of the Petitioners, This Case Is a Poor Vehicle To Resolve the Existing Conflict.

Respondents view this case as the worst available vehicle for consideration of the application of Title II to prisoner cases. The Court of Appeals used only one sentence, citing another Eleventh Circuit case, to uphold the district court's judgment regarding the availability of monetary damages under Title II, did not publish the case, and sent the case back to the district court for the relief Goodman sought from it: a requirement that the lower court consider his claim for monetary damages and injunctive relief resulting from alleged violations of his Constitutional rights.

### A. The present case is based entirely on another Eleventh Circuit case still in the pipeline, *Miller v. King, et al.*

The Eleventh Circuit fully analyzed the question of whether Congress properly abrogated the States' Eleventh amendment immunity for monetary damages claims in Title II of the ADA under §5 of the Fourteenth Amendment in *Miller v. King*, *supra*, and said "Title II of the ADA, as applied in the Eighth Amendment context to state prisons, fails to meet the requirement of proportionality and congruence." 384 F.3d, at 1275. It further said, in *Miller*, that "to uphold Title II's application to state prisons would allow Congress to 'rewrite' the Eighth Amendment law." *Id.* The Eleventh Circuit took eight pages in *Miller* to analyze the legal issues involved with Congress's abrogation of States' Eleventh Amendment immunity in Title II of the ADA. In the present case, the Court took one sentence to affirm the District Court's decision on the basis of the *Miller* holding.[4]

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[4] Petitioner United States admits in a footnote that its petition for rehearing and rehearing en banc remains pending in the *Miller* case in the Eleventh Circuit Court of Appeals. Said petitioner further admits *Miller* involved the same Eleventh amendment issue presented here, and then speculates that "whatever the ultimate disposition of the *Miller* petition, it will not affect that aspect of the court's holding pertaining to the scope of Congress's Section 5 power, which the Goodman panel applied here." Respondents submit this is nothing more than an attempt to have this Court consider the *Miller* decision through the present case, before *Miller* reaches this Court. Respondents urge this Court to resist such a temptation.

### B. The Eleventh Circuit gave the inmate what he sought: a trip to the District Court with a chance at monetary relief.

Respondents also show the Court of Appeals remanded Petitioner Goodman's case for ADA injunctive relief as well as his Eighth Amendment claim for monetary damages. Petitioners' Appendix A, p. 22a. Therefore, if Petitioner Goodman's request for certiorari is not granted, Goodman has a remedy wherein he returns to the District Court for an opportunity to be heard and a chance at monetary relief for his alleged injuries.

### C. This case is unpublished, thus minimizing its effect on other courts and the state of the law.

Finally, Respondents mention the unpublished nature of the case the Petitioners seek a writ for in this case. Eleventh Circuit Rule 36-2 clearly says "[u]npublished opinions are not considered binding precedent." 11th Cir. R. 36-2. Furthermore, in Internal Operating Procedure (I.O.P.)-7, the circuit court says it "generally does not cite to its 'unpublished' opinions because they are not binding precedent." *Id.* Other courts have similarly said unpublished opinions are not binding. *See, e.g. United States v. Madden*, 2005 U.S. App. LEXIS 5326 (6th Cir. 2005), *Sentry Prot. Prods. v. Eagle Mfg. Co.*, 400 F.3d 910 (Fed. Cir. 2005), and *Phiffer v. Columbia River Correctional Institute*, 2001 U.S. Dist. LEXIS 23734 (D. Ore. 2001). It is extremely unlikely any court would use the *Goodman* case from the Eleventh Circuit as precedent to hold Congress improperly abrogated the States' Eleventh Amendment immunity in Title II of the ADA as applied to prison conditions.

As this Court's calendar does not allow for the granting of certiorari except on important cases with ripe and "real" (according to Justice White) conflicts between the circuits, it strains imagination to see how this case could be the ideal vehicle for this Court to deal with the question of the application of Title II to prison inmates' claims for monetary damages on allegations regarding the conditions of their imprisonment. Because *Miller v. King*, *supra*, not the present case, is the Eleventh Circuit's chief case on the issue of Congress's abrogation of states' Eleventh Amendment immunity in Title II of the ADA, because the present case is unpublished, and therefore, unbinding, and because Mr. Goodman, if certiorari is not granted, will still be able to be heard on his claim to monetary damages under §1983, Respondents argue this case is not the proper vehicle for this Court to address the important question presented.

## III. The Eleventh Circuit's analysis and decisions regarding the application of Title II to prisoners' Eighth Amendment claims are consistent with this Court's decision in *Lane*.

The conflict in this case concerns the lower courts' response to this Court's decision in *Tennessee v. Lane*, *supra*, as applied in the context of ADA Title II claims by incarcerated state prison inmates regarding the conditions of their confinement. Respondents contend the Eleventh Circuit has correctly followed *Lane* in its analysis of Title II of the ADA as to prison Eighth Amendment cases, and the application for a writ of certiorari should be denied. They further add that the Ninth Circuit, in *Phiffer*, where certiorari is also sought, did not follow *Lane*.

This court previously has stated that Congress may abrogate the states' Eleventh Amendment immunity. To determine whether Congress has done so, courts must ask: (1) whether Congress unequivocally expressed its intent to abrogate the states' immunity; and (2) if it did, whether Congress acted pursuant to a valid grant of constitutional authority. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). The second question is the only one relevant to cases concerning the propriety of Congress's abrogation of states' Eleventh Amendment immunity in Title II of the ADA.

In determining whether Congress has properly abrogated Constitutional immunity, the "congruence and proportionality" test must be applied. This test, developed by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), requires a court to (1) identify "with some precision the scope of the constitutional right at issue; (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States, and (3) if so, analyze whether the statute is an appropriate, congruent and proportional response to that history and pattern of unconstitutional treatment. *Miller v. King*, 384 F.3d, at 1269, citing *Board of Trustees v. Garrett*, 531 U.S. 356, 374 (2001).

Further focusing the analysis which needs to take place, this Court in *Tennessee v. Lane*, *supra*, said "[t]he only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." 124 S.Ct., at 1992. This Court then said "nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole." 124 S.Ct., at 1992. Therefore, it then examined Congress's abrogation as it "applies to the class of

cases implicating the accessibility of judicial services." *Id.* at 1993.

In other words, this Court set down a formula for analysis of Congress's abrogation of Eleventh Amendment immunity in Title II of the ADA: Ask the third question of the *Boerne* test on an as-applied basis regarding the type of Title II claim in question, such that the court should analyze whether the statute is an appropriate, congruent and proportional response to the history and pattern of unconstitutional treatment of people with disabilities as applied to the rights in question. In *Miller*, the Eleventh Circuit applied the formula to prison conditions for incarcerated convicts in state prisons. In the present case, as stated earlier, the Court simply cited *Miller* to throw out Goodman's ADA claim for monetary damages.

In the case on which the *Goodman* court relied in making its decision, *Miller v. King*, *supra*, the Eleventh Circuit gave proper deference to this analytical roadmap in coming to its conclusion regarding the propriety of Congress' abrogation of Eleventh Amendment immunity. With regard to the three-part test prescribed by this Court in *Boerne*, the Eleventh Circuit cited this Court's *Lane* decision as saying, with regard to the first part – identification of the scope of the constitutional right at issue – that "Title II seeks to enforce the Fourteenth Amendment's 'prohibition on irrational disability discrimination.'" 384 F.3d, at 1270. It added that this Court, in *Lane*, further said Title II "'seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review,' including rights related to access to courts ... and the Confrontation Clause of the Sixth Amendment." *Id.*

In response to the second requirement – that it determine whether Congress identified a history and pattern of unconstitutional conduct by the States – the Eleventh Circuit further gave credence to this Court's decision in *Lane*, stating that "[t]he Supreme Court concluded that Title II of the ADA was enacted in response to a history and pattern of constitutional violations by the States, thereby satisfying *Boerne*'s step-two inquiry." *Id.* at 1270-71. Only on the third part of the *Boerne* test – whether the legislation at issue is a congruent, proportional response to the history of Constitutional violations found in the second part – does the Eleventh Circuit give itself room to engage in independent analysis of Title II of the ADA. *Id.* at 1271. In doing so, it further adhered to this Court's *Lane* decision by saying it requires that this third question must be answered on an as-applied basis to the application of Title II at issue, which, in both *Miller* and the present case, involves its application to convicted incarcerated prisoners' prison condition claims.

This deferential, but thorough, analysis contrasts sharply with the Ninth Circuit's decision in *Phiffer v. Columbia River Correctional Institute*, *supra* (cert. pending), where the Ninth Circuit found it unnecessary to engage in any detailed analysis of the specific rights involved in a Title II claim by a formerly incarcerated convict. Instead, the Ninth Circuit simply said binding circuit precedent issued before the *Lane* case required that it find, across the board, that "the State is not entitled to Eleventh Amendment immunity under Title II of the ADA." 384 F.3d, at 792, citing *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997). In a concurring opinion, Judge O'Scannlain warned that trouble may come from the

across-the-board opinion. "Because *Dare* and *Clark* upheld the entirety of Title II without engaging in the nuanced, case-by-case analysis demanded by *Lane*, their continued vitality is uncertain." *Id.* at 793. The Ninth Circuit's decision in *Pfiffer* will not be able to withstand whatever conclusion this Court makes with regard to the application of Title II of the ADA to Eighth Amendment claims by prison inmates. Even if the Court decides Congress properly abrogated the States' Eleventh Amendment immunity in devising the ADA as to prisoners' Title II claims, the Ninth Circuit will have to come into line with the main effect of this Court's *Lane* decision: that all courts analyzing the application of Title II of the ADA to all government scenarios must involve the three-step analysis set down in *Boerne* and *Lane*, with emphasis on the third question (whether Title II is an appropriate response to the history and pattern of unequal treatment found in response to the second question) on an as-applied basis.

For this reason, if this Court deems it necessary to consider a case regarding application of Title II of the ADA to prisoner claims, the decision of the Ninth Circuit in *Pfiffer*, where that Court ignored the analysis standard set down in *Lane*, should be taken over the present case or *Miller*.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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